In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 359

ROBERT L. MARTIN,

Petitioner,

vs.

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners, doing business as Birch, Lytle & Green,

Respondents.

L. A. MARTIN,

Petitioner,

vs.

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners, doing business as Birch, Lytle & Green,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Robert L. Martin and L. A. Martin, pray that a Writ of Certiorari be issued to review the

judgment of the United States Court of Appeals for the Ninth Circuit reversing judgments upon jury verdicts given in the District Court for the District of Alaska, Third Division.

OPINION BELOW.

The District Court did not render an opinion. The opinion of the Court of Appeals is reported at ..... F. (2d) .....

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 15, 1957. The jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, C. 646, Sections 1254, 2101; 62 Statutes 828, 961; 28 U.S.C.A. 1254, 2101) and rules 21, 22, and 23 of the revised rules of the Supreme Court of the United States, adopted April 12, 1954, effective July 1, 1954, and other Court rules.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals violated the Seventh Amendment of the Constitution of the United States by reversing a jury verdict of the Court below, and if said reversal did not violate the Seventh Amendment: whether the Court of Appeals erred in failing to award a new trial.

2. Whether the decision of the Court of Appeals for the Ninth Circuit herein conflicts with the decisions of the Court of Appeals for the District of Columbia in *Lansburgh & Bro. Inc. v. Clark,* 127 Fed. (2d) 221, and the United States District Court for the District of Missouri in *Franklin v. May Dept. Stores Company,* 25 Fed. Supp. 735.

STATUTORY REGULATIONS INVOLVED.

Rule 50 of the Federal Rules of Civil Procedure.

STATEMENT.

The two petitioners herein obtained judgments in the District Court for the Third Judicial Division, Territory of Alaska, upon jury verdicts. The two cases had been consolidated for trial and the cases involved essentially the same facts. A Remittitur of $2,500.00 was ordered in one of the cases before judgment was entered.

The petitioners' claims resulted from personal injuries suffered through physical attacks by a group of men, at, or near, the Asphalt Paving Plant of the construction company which was in the process of paving the highway. The construction company had furnished its employees, or former employees, alcoholic drinks and a completion celebration, participated in by the superintendent and foremen, was in full force at the time of the injuries to the petitioners.

The two petitioners' cases were consolidated for trial which covered approximately five days. Jury verdicts were rendered for the petitioners in both cases with a total compensatory and punitive award of $9,000.00 for petitioner L. A. Martin, and a total compensatory and punitive award of $10,000.00 for petitioner Robert Martin. The $9,000.00 award for petitioner L. A. Martin was reduced by a Remittitur of $2,500.00, and judgments were entered in both cases.

Both actions in the District Court were brought against the construction company known as Birch, Lytle & Green, which consisted of a three corporation partnership, and against five individuals. Two of the named individuals were Ross McDonald and R. E. Wise, the general superintendent and a foreman respectively. In both cases Ross McDonald and R. E. Wise were freed of liability by the jury. In the Robert L. Martin verdict the jury held the company and one individual liable, and in the L. A. Martin case the jury held the company and two individuals liable. Of the defendants, the company alone appealed to the Court of Appeals for the Ninth Circuit. Petitioner L. A. Martin cross-appealed on the question of Remittitur.

The Appellate Court held that the construction company could neither be held under the doctrine of *respondeat superior* nor under the theory of negligent control of the area in their possession. The doctrine of *respondeat superior* was rejected by the Appellate Court after determination by the appeals Court that none of the men who had assaulted the petitioners

were on duty. The appeals Court further rejected the negligent control theory after another determination, by the appeals Court, that the company was not negligent independent of its supervisory employees. The appeals Court thus held that the release of the two supervisory employees, McDonald and Wise, relieved the construction company of liability. The judgments in both cases were reversed by the Court of Appeals.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals of the Ninth Circuit erred:

1. In holding that the construction company was not liable under the doctrine of *respondeat superior.*

2. In holding that the construction company was not liable under the theory of negligent control of the area in their possession.

3. In holding that there was an inconsistency of verdicts wherein the jury released McDonald and Wise, but held the company.

4. In holding that the company was not negligent independent of its supervisory employees.

5. In substituting the opinion of the appeals Court in place of that of the jury and in failing to order a new trial in the Court below.

6. In failing to set aside the remittitur which was not based upon any reason, but was arbitrarily assessed.

7. In considering the sufficiency of the evidence when time card exhibits of the construction company employees were not included in the record.

REASONS FOR GRANTING THE WRIT.

The greatest error of the Court of Appeals was its failure to take into consideration that part of the Seventh Amendment, "... and no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to the rules of the common law." The result was an opinion and judgment directly in conflict with *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, wherein it was held that the Circuit Court of Appeals could only direct that a new trial be had, if error in the trial Court were found.

The *Slocum* case applies, despite the application of rule 50(b) of the Federal Rules of Civil Procedure, and the later cases modifying the *Slocum* case, for the reason that the question of judgment *n.o.v.* was not properly before the Court of Appeals so as to enable the Appellate Court to apply the doctrine of *Montgomery Ward & Co. v. Duncan*, 61 S.Ct. 189, 311 U.S. 243, 85 L. Ed. 147, and enter judgment *n.o.v.* The judgment of the lower court was reversed upon the theory of inconsistencies of verdicts. This ground was never set forth in any motion made in the District Court, nor, for that matter, was it even urged on appeal. The specifications of error relied upon by the appellant were set forth as follows:

"1. That the evidence was insufficient to establish the relationship of employer and employee, master and servant or principal and agent as between the appellants and the participants in the wrongful acts complained of by the plaintiff.

2. That there was insufficient evidence to establish that the appellants were guilty of an intentional tort.

3. That the verdict was contrary to the law and to the evidence.

4. That the trial court erred in denying defendants Birch, Lytle & Green's motion for a directed verdict made at the close of the plaintiff's case and renewed at the close of all evidence.

5. That the trial court erred in denying appellants' motion for judgment notwithstanding verdict.

6. (07) That the trial court erred in denying appellants' motion for a remittitur.

6. (08) That the trial court erred in ordering a remittitur as to the general damages and making no remittitur as to the punitive damages.

7. That the trial court erred in instructing the jury as excepted to by the appellants at the time of trial, and particularly erred in instructing the jury on mob violence.

8. That the trial court erred in failing to instruct as requested by the appellants.

9. That the verdict is excessive.

10. That the trial court erred in submitting punitive damages to the jury so far as the appellants are concerned.

11. That the trial court erred in its minute order of February 9, 1956 in respect to the fixing of interest upon the judgment."

Since these specifications show that inconsistency of verdict was not before the court on appeal, such a ground could not have been before the court in the motion for judgment *n.o.v.*

It is true that a motion entitled "Motion for Judgment for defendant Birch, Lytle & Green" was filed on October 12, 1955 two days after the return of the verdicts in the two cases. However, there is nothing in the motion that even suggests by inference that inconsistency of verdicts was one of the grounds. Thus, it can be seen that if the judgment of the Court of Appeals is a judgment upon a motion for a directed verdict or for a judgment *n.o.v.*, no motion has ever set forth the specific grounds upon which the cases were actually reversed.

Since the grounds were not set forth in the motion in the District Court, this case raises questions closely related to the case of *Johnson v. New York, N.H. and R.H. Company*, 344 U.S. 48. The *Johnson* case had a strong dissent, so it should be noted that the requirement of the statement of specific grounds in the case at bar is not "obedience to lifeless formality" for had the motion contained the specific grounds, a different result may have prevailed in the District Court. In any event, the District Court should have been given a chance to exercise its discretion as this Court has held in *Cone v. West Virginia Pulp &*

Paper Co., 330 U.S. 212. The question is also very similar to that of *Fountain v. Filson*, 336 U.S. 681 wherein this court held that the Court of Appeals could not enter a judgment on an entirely new issue.

The Court of Appeals' opinion appears to indicate that the error was that of the jury in releasing two of the supervisorial employees, McDonald and Wise, while holding the company. In referring to the question of negligent control of the area the appeals Court stated at page 431 of the record.

> "There was sufficient evidence of Appellant's breach of its duty to present this issue to the jury."

The Court also indicated for almost half a page just what the evidence consisted of, and from this statement it appears to be a reasonable inference that the Court of Appeals felt that there was negligence. The logical conclusion from this, after the jury absolved McDonald and Wise from individual responsibility, would be that the jury had either acted arbitrarily or had been improperly instructed. In either event, the proper course for the Appellate Court would have been to order a new trial, and not to substitute its own opinion for that of the jury.

Also, although this case does not involve missing evidence which was within the power of the petitioner to produce as in *Galloway v. United States*, 319 U.S. 372, the petitioners could unquestionably strengthen their case by a new trial. This was pointed out by the dissent at page 411 of the *Galloway* case. If more

evidence is necessary to convince the Court, than to convince the jury, this should be done through a new trial.

2. If the liability of the employer were based solely on the doctrine of *respondeat superior* the petitioners could not have joined the employer and employees under the old common law system, since the actions would have been by two different writs, namely *case* and *trespass*. 98 *A.L.R.* 1058. With this in mind, it appears that the holding in the cases at bar cannot be reconciled with that of *Lansburgh & Bro. Inc. v. Clark*, 127 Fed. (2d) 221, Court of Appeals for the District of Columbia. The cited case involved inconsistent verdicts wherein the jury brought in a verdict for the husband, but against the wife where the cause of action was based upon injuries to the wife. The Court in the *Lansburgh* case indicated that the actions of the husband and wife could not have been joined at common law and that since they could be joined under Rule 20 that the result should not be different.

Although the inconsistencies involved the two plaintiffs in the *Lansburgh* case, and the defendants in the case at bar, the effect is substantially the same. With reference to the two different verdicts the court stated at page 333 of the *Lansburgh* opinion:

> ". . . That they are inconsistent is obvious. The same jury listened to the same argument and the same evidence at the same time in both cases and rendered two irreconcilable verdicts. They either mistakenly or arbitrarily failed to perform their duty . . ."

Then after this determination, the Court in the *Lansburgh* case refused to decide which verdict was wrong and affirmed the judgment for the husband based upon the inconsistent verdict. The Court indicated that the granting of a new trial as to both husband and wife could have been proper, but the motion was made for a new trial only as to the husband, the prevailing plaintiff. The motion in the case at bar was made only as to the losing defendants. The holding of the case decided by the Court of Appeals for the Ninth Circuit cannot be reconciled with the holding of the Court of Appeals for the District of Columbia.

The holding of the Court of Appeals is, essentially, that the principal would not be liable for the non-feasance, consisting of the negligent control of the area, unless its two supervisory employees were also liable. This, by inference, is contrary to the holding in *Franklin v. May Dept. Stores Company*, 25 Fed. Supp. 735, D.C. Mo., which case involved the question of liability of the employee for non-feasance. The opinion in the cited case states at page 736:

> "There can be no recovery from an agent or servant for non-feasance alone unless the agent has assumed and actually commenced such a complete and exclusive control of management or operation as to warrant saying that he failed in discharging or completing a duty theretofore assumed and commenced."

Thus, the company could be liable for its omissions of duty toward the public, but unless complete and ex-

clusive control was in the employee, the employee would not be liable.

It does not appear that any determination was ever made by the Court of Appeals that McDonald and Wise had assumed complete and exclusive control of the area, and petitioners' claims were based on the theory of possession being in the company. So the Court of Appeals holding that the release of the employees releases the employer without a showing of complete and exclusive control in the employee appears to directly conflict with the holding of the Missouri District Court in the *Franklin* case.

Finally, it should be noted that throughout the ten page opinion of the Court of Appeals the facts of these cases have been determined, discussed and distinguished. Then, upon these facts, in the finding of which reasonable minds could have differed, the Court misapplied the law. As indicated by the dissent in the *Galloway* case with respect to the question of usurping the jury function this case "marks a continuation of the gradual process of judicial erosion. . . ." Perhaps the erosion here is more than gradual when it is considered that the Appellate Court overturned jury verdicts, reached after a long trial on grounds that were not even considered by appellants' counsel upon appeal.

CONCLUSION.

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Dated, Anchorage, Alaska,
August 7, 1957.

Respectfully submitted,
BAILEY E. BELL,
JAMES K. TALLMAN,
Attorneys for Petitioners.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellants. vs. Robert L. Martin, Appellee.	No. 15,107
S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellants. vs. L. A. Martin, Appellee.	No. 15,108
L. A. Martin, Appellant, vs. S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellees.	May 15, 1957

Appeals from the District Court for the District of Alaska, Third Division

Before: Bone, Fee and Barnes, Circuit Judges

Barnes, Circuit Judge:

On August 14, 1952, along a narrow strip of highway approximately six miles south of Anchorage,

Alaska, L. A. Martin (hereinafter, Martin Sr.) and his son, Robert Martin Jr., were beaten and bloodied by a group of road construction workers, buoyed by alcoholic beverages and the happy knowledge of a job completed.

Subsequently, the father and son filed these actions against S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, (partners doing business as Birch Lytle & Green) and five individual defendants, Ross McDonald, Cecil "Joe" Sipes, John P. Bell, Duane J. "Bud" Weber, and Raymond E. Wise, all employees of the aforementioned partnership. The actions were consolidated for trial. The cases were tried by a jury, which returned a verdict in favor of Martin Sr. against the three corporate partners, and Bell and Weber, individually, for $7,000 compensatory and $2,000 punitive damages. The trial judge later directed and Martin Sr. consented to remittitur of $2,500 of the compensatory award. The jury also returned a verdict in favor of Martin Jr. against the three corporate partners, and Weber, individually, for $7,500 compensatory and $2,500 punitive damages. McDonald and Wise were exonerated in each action. Sipes was not served with summons and did not participate in the trial. The defendant partnership alone prosecutes these appeals. Martin Sr. has cross-appealed, challenging the propriety of the remittitur.

The incident took place alongside and on a twenty-foot wide stretch of highway. The defendant partnership had just completed work on approximately one

thousand feet of new paving on the west half of said highway. The narrow width of the highway necessitated vehicular traffic control by flagmen employed by the partnership. These men were stationed at barricades at each end of the construction zone. They permitted north and southbound traffic to travel alternately along the eastern ten feet width of the highway.

Sometime after 6:00 P.M. and before 7:00 P.M., the plaintiffs, driving their automobile south through the gathering twilight at the head of a procession of southbound traffic, were flagged onto the eastern one-half of the highway. After traveling approximately one-half the distance through the traffic control, the plaintiffs' vehicle found its forward progress blocked by a northbound car, driven by Sipes, in which Weber was a passenger. The impasse occurred immediately opposite the gravel pit and asphalt plant, which together with the partnership office and a scale house, were located off the highway to the west. There was no traffic behind the northbound car; there was an undetermined amount of traffic behind the southbound car.

Each driver insisted that the other give him the right of way. An altercation ensued. At this point, the testimony differs. According to the conflicting evidence, Martin Jr., the driver of the southbound car, was grabbed by Weber who stood, "half-soused," with beer can in hand outside the Martins' car window and when Martin Jr. tried to disengage himself, Weber pulled him out of the car, *or*, he (Martin Jr.) jumped out of the car without provocation to do battle with Weber, who was empty-handed and merely feeling

"happy." Martin Jr. was knocked down by one and attacked by four or five men (including Sipes) and kicked in the mouth, *or*, he knocked down Weber three times, and as one witness positively stated—was never struck himself. The stories of Martin Sr.'s activities are just as disparate. He was struck in the face and knocked unconscious by Bell, either while reaching for a lug wrench in the car trunk, which he sought in order to aid his son, *or*, after he had obtained the wrench and was rushing into the melee to even it up.

When Martin Jr. saw his father lying on the ground he hurried to his side to protect him from further blows. None were forthcoming. Martin Jr. then lifted his father back into the car and prepared to depart. However, the milling group of men surrounding the car, estimated at ten to fifteen in number, refused to permit them to leave the area. One of the men—supposedly McDonald—told the Martins that "We have taken off you S.B.'s for the last four or five years; now, you're going to listen to us; you're not going anywhere." Martin Jr. obeyed instructions and remained at the scene. His auto, a former taxicab, had a two-way radio in it, and he called the police. After a few minutes wait the Highway Patrol arrived on the scene and plaintiffs were allowed to leave. The entire incident did not consume more than forty minutes.

There is no doubt that the plaintiffs were beaten by someone during the fray. Martin Sr. sustained bloody and cut lips, loss of his set of artificial dentures, a large knot like lump—"as big as an egg"—on the back

of his head, a concussion, and sundry other more minor injuries. Martin Jr. suffered a concussion, a badly cut eye, a bruised knee, had two teeth knocked out and several others loosened.

At the trial the defenses of mutual combat and self-defense were presented by counsel for the defendants, but the jury obviously rejected both of them. It apparently accepted plaintiffs' version of the fracas as related above. We cannot disturb its resolution of conflicts in the evidence as to who among the individuals sued bore the responsibility for the assault. *Parker v. Title & Trust Co.*, 9 Cir., 233 F.2d 505; *Capital Transit Co. v. Bingham*, D.C.Cir., 212 F.2d 241.

The evidence raises certain questions of law. Two distinct theories upon which liability of the defendant partnership could be predicated were submitted to the jury. Plaintiffs sought to impose both vicarious and direct liability on the partnership. Vicarious liability rested squarely on the doctrine of respondeat superior. Direct liability was founded on alleged negligence in failing to use reasonable care to protect highway users during their passage through the controlled area from the unlawful acts of employees.

To hold the partnership responsible under the doctrine of respondeat superior, plaintiffs were required to prove that the attack upon them by the employees occurred during the course and in the scope of their employment.[1] The pummeling administered plaintiffs

[1] N.L.R.B. v. International Longshoremen's & Warehousemen's Union, 9 Cir., 210 F.2d 581.

by Weber, Bell, and Sipes constituted no less than an aggravated assault and battery.[2] Their actions were willful, wanton and intentional. Indeed, plaintiffs contend their conduct was criminal in character.[3] The fact that the unlawful activity was intentional and even criminal does not per se take it out of the scope of employment. "It is accepted law that the master may be liable for the willful and malicious acts of a servant . . ." *Novick v. Gouldsberry,* 9 Cir., 173 F.2d 496, 500. But such fact is an important consideration in ascertaining if the specific acts charged occurred while the servant was acting within the scope of his employment. Its precise effect in a given case will vary with the particular factual context involved.

Here the acts complained of constituted battery. "To create liability for a battery by a servant upon a third person, the employment must be one which is

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[2]Plaintiffs alleged in their separate complaints that several unidentified "John Does", also employees of defendant partnership, participated in the fight. But they were unable to identify these unknown persons or their employer at the trial. Since persons other than employees of defendant partnership were present at the construction site, it seems highly dubious that the partnership could be held liable for the acts of the unidentified "John Does." In any event, the same considerations that control the question of scope of employment of the identified aggressors would also apply to the unidentified persons.

[3]Both parties have devoted much effort to a discussion of liability based on "mob violence." Such conduct is deemed criminal under the law of the Territory of Alaska. ACLA 65-10-1 (1949). However, it is the general rule, and no Alaska legislative history or judicial decision is cited to the contrary, that such legislation does not create a new basis of statutory liability independent of common law liability. The civil action remains one for trespass or assault committed pursuant to the mob enterprise. 46 Amer. Jur. 135. Accordingly, the text discussion of the partnership's liability for its employees' assaults comprehends this theory.

likely to bring the servant into conflict with others." Restatement of Agency, §245, Comment a. What is needed is a functional relationship between the employment and the wrongful act or acts. It must be shown that "the particular tortious act was (not) clearly unrelated to the accomplishment of any of the objects of the employment." *Novick v. Gouldsberry,* supra, at p. 501. Where the connection is too remote and attenuated, the master is not liable. Under such conditions the only reasonable inference to be drawn from the servant's conduct is that he is giving vent to personal feelings and is seeking solely to further his personal interests. "When this is the case, the mere fact that the act which caused the harm was done while the servant was acting in the employment and on the employer's premises would not result in liability. 35 Amer. Jur., Master and Servant, Sec. 55; Restatement, Agency, Sec. 245, Comment (d), p. 550." *Novick v. Gouldsberry,* supra, at p. 501. It must appear that the employee is acting in part at least in the interests of his employer; mixed motives will suffice. But where the employee acts only to further his own interests, the employer is not liable. *Nelson v. American-West African Line,* 2 Cir., 86 F.2d 30. The question is essentially one of degree. An assault by a hockey player on a spectator may justify vicarious liability, *M. J. Uline Co., Inc. v. Cashdan,* D.C.Cir., 11 F.2d 132, whereas an assault by one construction worker upon another may not. *Park Transfer Co. v. Lumbermen's Mut. Cas. Co.,* D.C.Cir., 142 F.2d 100. Each case must be decided in its own unique factual setting.

Applying these general principles to the case at bar, we find that both Weber and Sipes were truck drivers, and Bell was a paving operator. None had any duties which necessitated or were likely to call for the use of force. None even had any duties which were likely to bring any of them into direct contact with passing motorists. None was charged with controlling the flow of traffic in the restricted area or with clearing road jams. Moreover, none of the identified trio were *on duty* when the incident occurred. *All* had checked out for the day and were on their way home. The time cards show that Bell signed out at 5:30 p.m. and Weber at 6:00 p.m., while Sipes completed his shift at 5:30 p.m. also. Their continued presence at the work site was due to their desire to participate in the job completion celebration. They had no duties while *on work* which would warrant the conclusion that their wrongful acts were committed while they were acting within the scope of their employment; a fortiori when they were *off work*. The proximity to their employment was geographical not functional. Such proximity is not enough to establish liability.

It is, of course, quite possible that during the course of their labors on this particular project the men became irritated with highway users who interrupted or impeded their work. In their uninhibited state they may well have pictured plaintiffs as the personifications of the Despised Motorist. Nonetheless, as a distinguished commentator has pointed out: "The servant's act in punishing persons who annoy him in the performance of the service . . . can very seldom be

regarded as within the (scope) of the employment." 2 Mechem, Agency, 2 Ed. 1914, §1978. This is not one of those rare situations.

It might be argued that while the aggravated assaults would not under ordinary circumstances come within the scope of the employment of the known assailants, they would in this particular instance because a managerial official of the defendant partnership either authorized or ratified them. McDonald was the general superintendent on the construction project. There is no evidence in the record that he authorized or approved in advance, or even acquiesced, in the attacks upon the Martins. His presence on the scene begins just as the actual brawling was ending. He reached plaintiff's car at the same time Martin Sr. was knocked to the ground. No further physical injuries were inflicted on plaintiffs thereafter. McDonald is charged with detaining plaintiffs and he admits that he ordered them off the road to alleviate the traffic clog. In respect to the remarks he purportedly made to plaintiffs, heretofore quoted in full, which were tinged with antagonism and indicated satisfaction with plaintiffs' plight, there is no credible basis in the record establishing McDonald as their source. Both Martins said they saw McDonald and heard him speak but neither was able to identify him at the trial; in fact, Martin Sr. mistakenly identified another man as McDonald. Martin Jr. did *not* testify that he heard the profane taunt, although he was in full possession of his faculties when it was supposedly uttered. Martin Sr. claimed that he heard the remarks while re-

gaining consciousness and while he was still "coming and going" and that an anonymous onlooker identified McDonald as the speaker. This is hardly adequate evidence to bind the partnership, on a theory of ratification, to vicarious liability.

Our holding in the instant cause does not conflict with the decisions of this Court in the *Novick v. Gouldsberry*, supra, and *Pac. Tel. & Tel. v. White*, 9 Cir., 104 F.2d 923, cases. In *Novick* we upheld a judgment against a saloonkeeper for an assault made by a bartender while on duty, on the ex-husband of the bartender's wife. The rationale of the decision was that the bartender, by the very nature of his employment, "was authorized to maintain order in the saloon, and the assault was committed in the course of his keeping order." 173 F.2d 496, 501. In *White* the employer was held liable for an assault committed upon a suspected robber by its chief special agent while attempting to procure a confession. The agent had general authority to make a full investigation of the robbery and consequently the assault committed pursuant to his investigation did not fall outside the scope of his employment. The bartender in *Novick* and the special agent in *White* both had jobs which were likely to bring them "into conflict with others." Restatement of Agency, §245, Comment (a). In each of those instances it could be said that the employee was acting to some degree in his employer's interest. That vital link—there present—is here absent. The respondeat superior doctrine cannot apply.

The fact that vicarious liability cannot be sustained does not necessarily absolve the partnership from any and all liability.

The relationship of employer and employee creates under certain circumstances a duty on the employer to use reasonable care to control the activities of the employee on the work premises so as to prevent harm to persons coming onto the premises, despite the fact that such activities are not within the scope of employment and are done solely to advance the personal interest of the servant.[4] Prerequisite to liability is a showing that the employer knew or should have known of the necessity and opportunity for exercising such control.

The jury was properly instructed as to the nature and scope of this duty. And a plausible basis for its application to the instant case might be constructed, if it were not for one overriding and insurmountable difficulty.

The scope of the duty in a highway construction zone realistically extends over the entire area where control by the employer is effective. The imposition of the duty is especially appropriate in the immediate vicinity of the highway. It existed at the site of this melee. There was sufficient evidence of appellant's breach of its duty to present this issue to the jury. The evidence shows that McDonald authorized the pur-

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[4]Fletcher v. Baltimore & Potomac Ry. Co., 168 U.S. 135, 18 S.Ct. 35, 42 L.Ed. 411; In re Sabbatino & Co., 2 Cir., 150 F.2d 101; Restatement of Torts, §317; Restatement of Agency, §213; Harper & Kline, "The Duty to Control the Conduct of Another," 43 Yale L.J. 886, 896 (1934).

chase of whiskey and beer in plentiful quantities for the men. Sipes and Weber, fearful such supply would be insufficient, procured more for their private supply and use. McDonald and Wise, also a Superintendent, were both aware that this was a job completion celebration. It is common knowledge that such occasions furnish the opportunity for, in the vernacular, "letting off steam." They saw the men consume the liquor and then obtain more beer. Surely they perceived the gay frame of mind of the men. They also saw the men congregate and remain in the construction zone area. However, despite having provided the alcoholic beverages to the men, they took no precautions to insure safe passage for motorists through the area. They had the ability to do so. This was incontrovertibly established by the undisputed evidence that when McDonald ordered Weber to desist from further brawling and to leave the area, he (Weber) obeyed. Under such circumstances the question of their negligence, if any, was for the jury to determine. Thus, it would appear that a valid theory of liability exists to support the jury verdict were it not for one crucial fact. It is, of course, true that the particular theory upon which the jury did base its verdicts is unknown. We already have held that one of the two alternatives—respondeat superior—was unsustainable. We now must hold that the second theory—negligent control—cannot be supported.

The fatal flaw in this latter theory is that the defendant partnership would be liable under the facts of this case only if its supervisorial employees, Mc-

Donald and Wise, had been derelict in the performance of their duties. The record does not disclose any independent negligent conduct on the part of the partnership itself. There is no evidence that the partners from the facts known or which should have been known to them, knew or should have known of the necessity of taking additional steps to protect the personal safety of passing motorists.[5] If they had any duty to act, it was by and through their superintendents on duty. The record reveals that McDonald and Wise were the only superintendents on duty and at the scene of the fight. They provided the liquor and they were responsible for policing the premises and controlling the men. Yet the question of their negligence in respect to the control of the restricted area was submitted to the jury in the same instruction as was the question of negligence of the defendant partnership. The jury absolved both McDonald and Wise from individual responsibility. We can only conclude therefrom that it found neither was negligent. The master's liability being wholly derivative, the release of the servants bars any recovery against the master. 57 C.J.S., Master & Servant, §619 (b), p. 421-2.

There being no valid basis for the compensatory damages awards, it follows that the awards of punitive damages—resting on the same ground as the compensatory verdicts—cannot stand.

[5]See Hedrick v. Fraternal Order of Fishermen of Alaska, 103 F.Supp. 582.

In view of our determination of the instant case we do not reach the merits of other points raised by appellant.

The cross-appeal of L. A. Martin remains to be considered. By it, he attempts to contest the validity of the remittitur to which he consented. He was not compelled to do this. He could have had a new trial, but he preferred to choose the reduced amount. He cannot now question the propriety of the judgment to which he gave consent. *Lewis v. Wilson,* 151 U.S. 551, 14 S.Ct. 419, 38 L.Ed. 267.

The judgments in these consolidated cases are hereby REVERSED as to the defendant partners only.

(Endorsed:) Opinion. Filed May 15, 1957.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

S. Birch & Sons, etc., et al., Appellants, vs. Robert L. Martin, Appellee.	No. 15,107

JUDGMENT

Appeal from the District Court for the District of Alaska, Third Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of Appellants and against the Appellee.

It is further ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

(Endorsed) Judgment

Filed and Entered: May 15, 1957

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

S. Birch & Sons, etc., et al., Appellants, vs. L. A. Martin, Appellee.	No. 15,108
L. A. Martin, Appellant, vs. S. Birch & Sons, etc., et al., Appellee.	

JUDGMENT

Appeal from the District Court for the District of Alaska, Third Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of Appellants S. Birch & Sons, and against the Appellee.

It is further ordered and adjudged by this Court, that the Appellants S. Birch & Sons, recover against

the Appellee for their costs herein expended and have execution therefor.

Endorsed) Judgment—Filed & Entered: May 15, 1957

Paul P. O'Brien, Clerk.